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Sovereign Immunity — An Argument Con

Steven A. Sindell*

UNDER THE CONCEPT OF SOVEREIGN OR GOVERNMENTAL IMMUNITY, a state may not be sued in tort without its consent.¹ This doctrine, though the subject of repeated judicial challenges, is adhered to in a significant number of jurisdictions.² It is the contention of this article that the reason for the rule no longer exists and that it should, therefore, be abolished as a controlling legal principle. Moreover, it is submitted that sovereign immunity violates the due process and equal protection clauses of the United States Constitution.³

Kent State and the Immunity Doctrine

Because sovereign immunity deprives individuals of the right to bring suit in tort for redress against the state, the doctrine has been the subject of severe criticism ever since its birth in the Feudal Era.⁴ There has been widespread criticism of the sovereign immunity doctrine among magistrates and scholars, and this criticism has recently surfaced in *Krause v. Ohio*,⁵ arising out of the killings and injuries of students on the campus of Kent State University in a shooting incident which occurred there in May, 1970.

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¹ 49 AM. JUR. *States, Territories and Dependencies*, § 91 (1943).

² Sovereign immunity exists virtually intact in the following states: Alabama, Arkansas, Connecticut, Delaware, Georgia, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Missouri, Montana, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, West Virginia, Wisconsin and Wyoming.

It has been partially or totally abrogated in the following states: Alaska, Arizona, California, Colorado, Florida, Hawaii, Idaho, Illinois, Kansas, Kentucky, Michigan, Minnesota, Nebraska, Nevada, New Jersey, New York, Rhode Island, South Dakota, Texas, Vermont and Washington.

³ U.S. CONST. amend. XIV, § 1.

⁴ See, e.g., *Fairbanks v. Schaible*, 375 P.2d 201 (Alas. 1962); *Stone v. Arizona Highway Comm'n.*, 93 Ariz. 384, 381 P.2d 107 (1963); *Muskopf v. Corning Hosp. Dist.*, 55 Cal.2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961); *Evans v. Board of County Comm'rs.*, 482 P.2d 968 (Colo. 1971); *Hargrove v. Cocoa Beach*, 96 So.2d 130 (Fla. 1957); *Smith v. Idaho*, 93 Idaho 795, 473 P.2d 937 (1970); *Molitor v. Kaneland Community Unit Dist.*, 18 Ill.2d 11, 163 N.E.2d 89 (1959); *Carroll v. Kittle*, 203 Kan. 841, 457 P.2d 21 (1969); *Haney v. Lexington*, 386 S.W.2d 738 (Ct. App. Ky. 1964); *Williams v. Detroit*, 364 Mich. 231, 111 N.W.2d 1 (1961); *Spanel v. Mounds View School Dist.*, 264 Minn. 279, 118 N.W.2d 795 (1962); *Johnson v. Municipal Univ. of Omaha*, 184 Neb. 512, 169 N.W.2d 286 (1969); *Rice v. Clark County*, 79 Nev. 253, 382 P.2d 605 (1963); *Willis v. Department of Conserv. & Econ. Dev.*, 55 N.J. 534, 264 A.2d 34 (1970); *Becker v. Beaudoin*, 106 R.I. 838, 261 A.2d 896 (1970); *Bucholz v. Sioux Falls*, 77 S.D. 322, 91 N.W.2d 606 (1958); *Kelso v. Tacoma*, 63 Wash.2d 913, 390 P.2d 2 (1964); *Holytz v. Milwaukee*, 17 Wis.2d 26, 115 N.W.2d 618 (1962); see also, authorities cited in notes 34 and 35, *infra*.

⁵ *Krause v. Ohio*, 28 Ohio App.2d 1, 274 N.E.2d 321 (1971); *rev'd*, 31 Ohio St.2d 132, 285 N.E.2d 736 (1972); *appeal dismissed*, 41 U.S.L.W. 3329 (U.S. Dec. 12, 1972) (No. 22), *petition for rehearing dismissed*, U.S., Jan. 22, 1973.

Several of the students injured at Kent, and families of those who were killed, sought to obtain redress by bringing suit against the State of Ohio as sole defendant for personal injuries and/or wrongful death. The pleading alleged that agents, servants, and employees of the State of Ohio were negligent and careless, and committed wanton and reckless misconduct, and prayed for damages in tort accordingly. In *Krause v. Ohio*, the trial court dismissed the State of Ohio as a party-defendant on the pleadings "for the reason that it has not consented to be sued in the circumstances disclosed by the complaint, and is immune from tort liability, by reason of its sovereign immunity."⁶ The effect of the trial court's decision was to deny the injured parties a forum for redress.

The *Krause* litigation took a unique turn at the intermediate appellate level. There, Presiding Judge Day, with one judge dissenting, delivered a four-part majority opinion reversing the trial court.⁷ First, the court held that the State of Ohio is responsible under the doctrine *respondet superior* for the tortious acts of its agents.⁸ Second, it held that the doctrine of sovereign immunity was unjust, arbitrary, and unreasonable, and that it was violative of the equal protection and due process clauses of the fourteenth amendment to the United States Constitution.⁹ Third, the court reasoned that since sovereign immunity was a creature of judicial interpretation, it could as well be abrogated by the judiciary.¹⁰ Finally, the court held that individual agents of the state retained immunity from civil liability while they were acting in an authorized capacity, but that the *state* was subject to liability if the activity was tortious.¹¹ The Court of Appeals addressed itself to the heart of the immunity problem:

Governmental immunity is an anachronism. It represents a vestige of the agent apotheosis of the state in the person of a king. That the king can do no wrong is a dubious concept in a nation whose very founding repudiated kings. Discussions of such immunity begin with the idea of protecting acts of the state (something greater than the sum of its citizens) and finish by shielding the wrongful acts of

⁶ Journal Entry, *Krause v. Ohio*, Civil No. 884,042 (Cuyahoga County, Ohio, C.P., Nov. 17, 1970).

⁷ 28 Ohio App.2d 1, 274 N.E.2d 321 (1971), *rev'd*, 31 Ohio St.2d 132, 285 N.E.2d 736 (1972), *appeal dismissed*, 41 U.S.L.W. 3329 (U.S. Dec. 12, 1972) (No. 22), *petition for rehearing dismissed*, _____ U.S. _____, Jan. 22, 1973.

⁸ *Id.* at 1, 274 N.E.2d at 322.

⁹ *Id.*

¹⁰ *Id.* at 2, 274 N.E.2d at 322.

¹¹ *Id.*

men. A person claiming injury is unprotected in either case. If, in fact, a culpable injury has been done and goes unchastised by the law because of the doctrine of sovereign immunity, that doctrine protects injustice for no better reason than that its source is the state. And the concept becomes this: "The king can do no wrong with impunity." This is outlaw doctrine, obviously incompatible with the rule of law. Moreover, the notion that the government may irresponsibly maim or kill contravenes the most elemental notions of due process of law.¹²

The State of Ohio filed an appeal to the Ohio Supreme Court. In a 6-1 opinion, Justice Lloyd Brown dissenting, the Supreme Court reversed the decision of the Court of Appeals and reasserted and reaffirmed the long line of Ohio decisions which supports the doctrine of sovereign immunity.

Justice Corrigan, in his concerning opinion in the Supreme Court, correctly characterized the decision as one that "forges no new principle of law, but adheres to one consistently applied by this court in the past."¹³ Thereafter, Arthur Krause brought an appeal to the Supreme Court of the United States, but the appeal was dismissed for want of a substantial federal question. A subsequent petition for rehearing was similarly dismissed.¹⁴

Sovereign Immunity: Long Live the King!

Governmental tort immunity was born in pre-sixteenth-century England, and was premised on the feudal notion that "The King can do no wrong." This latter concept was predicated on the rule in the feudal structure that the lord of the manor, or the king, was not subject to suit in his own courts.¹⁵ Thus, in the first English case on the subject, *Russell v. Men of Devon*,¹⁶ the court dismissed an action against all male inhabitants of the County of Devon on the basis that "it is better that an individual sustain an injury than that the public should suffer an inconvenience"¹⁷

The rationale of *Men of Devon* was adopted in America in an 1812 Massachusetts case, *Mower v. Leichester*.¹⁸ In that case, Mower's

¹² *Id.* at 5-6, 274 N.E.2d at 324-25.

¹³ 31 Ohio St.2d 132, 148, 285 N.E.2d 736, 746 (1972), *appeal dismissed*, 41 U.S.L.W. 3329 (U.S. Dec. 12, 1972) (No. 22), *petition for rehearing dismissed*, _____ U.S. _____, Jan. 22, 1973.

¹⁴ 41 U.S.L.W. 3329 (U.S. Dec. 12, 1972) (No. 22), *petition for rehearing dismissed*, _____ U.S. _____, Jan. 22, 1973.

¹⁵ See generally 1 F. POLLOCK AND F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 518 (2d ed. 1898).

¹⁶ 100 Eng. Rep. 359 (1788).

¹⁷ *Id.* at 362.

¹⁸ *Mower v. Leichester*, 9 Mass. 247 (1812).

horse was killed when it stepped into a hole on the Leichester Bridge. The court held that Leichester, on the authority of *Men of Devon*, being a quasi-corporation, would not be liable. Curiously, unlike the County of Devon, Leichester was incorporated, could sue and be sued, and had a corporate fund out of which the judgment could be satisfied. Notwithstanding these differences, the Massachusetts court followed the early English case and thereby created what is today a prevailing American rule.

The Case Against Immunity: Justification or Excuse?

Proponents of sovereign immunity contend that, though the doctrine *may* have been premised on an illogical and outdated concept, there are new legal and economic reasons for its perpetuation. These purported justifications have been summarized by the late Dean Prosser:

The immunity is said to rest upon public policy; the absurdity of a wrong committed by an entire people; the idea that whatever the state does must be lawful, which has replaced the king who can do no wrong; the very dubious theory that an agent of the state is always outside the scope of his authority and employment when he commits any wrongful act; reluctance to divert public funds to compensate for private injuries; and the inconvenience and embarrassment which would descend upon the government if it should be subject to such liability.¹⁹

The economic justification noted above by Dean Prosser as "the reluctance to divert public funds," has been frequently advanced by proponents of governmental immunity.²⁰ Accordingly, the State in *Krause v. Ohio* contended:

Thus, sovereign immunity stands in intimate relation to the ability of state government to meet its responsibilities. It protects vital state safety and social services, already woefully underfinanced; it enables the state to pursue long term social planning, without fear of an unexpected drain upon state monies; it relieves the state of government by timidity, whereby high risk but vital projects are rejected because of the threat of continuous and financially enervating litigation; and, finally, sovereign immunity spares the state a debilitating "tax" on its inescapable function as protector against civil violence.²¹

¹⁹ W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 125, at 1001 (3rd ed. 1964).

²⁰ The reason, however, was never mentioned by the Ohio Supreme Court in *Krause*.

²¹ Brief for Defendant-Appellant at 33, *Krause v. Ohio*, 31 Ohio St.2d 132, 285 N.E.2d 736 (1972), *appeal dismissed*, 41 U.S.L.W. 3329 (U.S. Dec. 12, 1972) (No. 22), *petition for rehearing dismissed*, _____ U.S. _____, Jan. 22, 1973.

The "economic justification" tends to support the rationale that the abolition of sovereign immunity and the state's consent to be sued is a matter peculiarly within the legislative prerogative.

It is submitted that this kind of reasoning, adopted by the proponents of governmental immunity, is unjustified. It has been persuasively argued that fear of economic consequences, judicial deference to the legislatures, and adherence to *stare decisis*, are more excuses for the continuing existence of this anachronistic doctrine, than justifications for its perpetuation.²²

The California State Legislature has made a study²³ of the economic consequences of the abolition of sovereign immunity which should allay fears of economic catastrophe. This report,²⁴ published by the California State Senate, outlined that in the State of New York between the years 1959 and 1962, the Court of Claims of New York disposed of cases with prayers totaling \$23,835,958, but that it actually paid, pursuant to judgment or settlement, only \$1,125,160, or 4.7% of the actual prayers.²⁵

Furthermore, the study indicates that any tort claims can adequately be buffered by means of insurance. In California, for example, after the *Muskopf* decision (which abolished sovereign immunity) but before the California Tort Claims Act became effective, insurance costs averaged between .099% to 1.269% of the annual budgets of cities, school districts and counties. In 1962, the average per capita cost for cities was only 41 cents; for school districts only 65 cents; and for counties, only 8 cents.²⁶ It would appear that the cost of abolition of sovereign immunity would be relatively small. Along these lines, Dean Green, commenting on the "economics theory," has noted the following:

Private concerns have rarely been greatly embarrassed, and in no instance, even where immunity is not recognized, has a municipality been seriously handicapped by tort liability. This argument is like so many of the horrors paraded in the early tort cases when courts were fashioning the boundaries of tort law. It has been thrown in simply because there was nothing better at hand. The public's will-

²² See, e.g., cases cited note 4, *supra*.

²³ Cited by Justice Lloyd Brown, dissenting in *Krause v. Ohio*, 31 Ohio St.2d at 156, 285 N.E.2d at 750.

²⁴ See CALIFORNIA SENATE FACT-FINDING COMMITTEE ON JUDICIARY, SEVENTH PROGRESS REPORT TO THE LEGISLATURE, (PART 1) (1961-63 GOVERNMENTAL TORT LIABILITY), available from the author or from the California State Senate, Capitol Bldg., 10th at L. & N., Sacramento, California 95814.

²⁵ *Id.* at 26; the New York Tort Claims Act had no upper limit as to the amount of recoverable damages.

²⁶ *Id.* at 13.

ingness to stand up and pay the costs of its enterprises carried out through municipal corporations is no less than its insistence that individuals and groups pay the costs of their enterprises. Tort liability is in fact a very small item in the budget of any well organized enterprise.²⁷

Even in the absence of a valid economic argument, many state jurisdictions continue to cover themselves with the immunity cloak. For the most part, immunity proponents have asserted that the courts are bound by *stare decisis*, and that any change from the status quo should be made legislatively, and not judicially. If ever any force of reason supported the existence of governmental immunity, such reason has clearly dissipated. In the 1961 California Supreme Court case, *Muskopf v. Corning Hospital District*,²⁸ Chief Justice Traynor thoroughly repudiated the outmoded logic of *Men of Devon*:

If the reasons for *Russell v. Men of Devon* and the rule of county or local district immunity ever had any substance they have none today. **PUBLIC CONVENIENCE DOES NOT OUTWEIGH INDIVIDUAL COMPENSATION**

* * *

The rule of government immunity for tort is an anachronism, without rational basis, and has existed only by the force of inertia. It has been judicially abolished in other jurisdictions.

* * *

None of the reasons for its continuance can withstand analysis. No one defends total governmental immunity. In fact, it does not exist. It has become riddled with exceptions, both legislative . . . and judicial, . . . and the exceptions operate so illogically as to cause serious inequality. (Emphasis added) (Citations omitted)²⁹

The decision in *Muskopf*, which was the first judicial decision completely abrogating sovereign immunity, reflects an ever-increasing dissatisfaction with the sovereign immunity rule. Indeed, since *Muskopf*, there has been a resounding judicial vocalization of discontent with the immunity doctrine. For instance, the Supreme Court of Wisconsin in 1962 said:

²⁷ Green, *Municipal Liability for Torts*, 38 ILL. L. REV. 355, 379 (1944).

²⁸ 55 Cal.2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).

²⁹ *Id.* at 216, 359 P.2d at 459, 11 Cal. Rptr. at 91.

There are probably few tenets of American jurisprudence which have been so unanimously berated as the governmental immunity doctrine. This Court, and the highest Courts of numerous States, have been unusually articulate in castigating the existing rule; text writers and law review writers joined in the chorus of denounciators.³⁰

The fact of the matter is that there are a number of judicial abrogations of sovereign immunity throughout the nation. Four state supreme courts, for example, have abolished the doctrine of sovereign immunity outright.³¹ Numerous other state supreme courts have virtually abolished the doctrine by partial abrogation, which effectively removes the philosophical and legal underpinnings of the doctrine.³² In addition, a number of state legislatures have rejected the doctrine of sovereign immunity in various legislative enactments.³³ Moreover, legal literature is surfeited with persistent and incisive protests against the doctrine, by writers and scholars.³⁴

These expressions of dissatisfaction with the sovereign immunity rule reflect the growing recognition of the injustice and irrationality inherent in this arguably discriminatory legal concept which denies innocently injured victims of state negligence, redress in the court. Many jurists of this country feel that the doctrine of sovereign immunity should, in fact, be abrogated. Though some attempts have been made to justify the doctrine, there is a dearth of material at

³⁰ *Holytz v. Milwaukee*, 17 Wis.2d 26, 33, 115 N.W.2d 618, 621 (1962).

³¹ *Stone v. Arizona Highway Comm'n*, 93 Ariz. 384, 381 P.2d 107 (1963); *Muskopf v. Corning Hosp. Dist.*, 55 Cal.2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961); *Evans v. Board of County Comm'rs*, 482 P.2d 968 (Colo. 1971); *Willis v. Department of Conserv. & Econ. Dev.*, 55 N.J. 534, 264 A.2d 34 (1970).

³² See cases cited note 4 *supra* (Alaska, Florida, Idaho, Illinois, Kansas, Kentucky, Michigan, Minnesota, Nebraska, Nevada, Rhode Island, South Dakota, Washington and Wisconsin).

³³ See, e.g., 28 U.S.C.A. §§ 1346, 2671-74 (1965); ILL. ANN. STAT., Ch. 37, § 439.8(b) (1972); IND. ANN. STAT., § 4-1501 (1972); MASS. ANN. LAWS, Ch. 258, § 1 (1968); MICH. COMP. LAWS ANN., § 600.6419 (1968); MINN. STAT. ANN., § 3.751 (1967); MONT. REV. CODES ANN., § 83-601 (1966); NEB. REV. STAT., § 24-319-335 (1965); N.H. REV. STAT. ANN., § 491.8 (1968); N.Y. CI. CL. ACT., § 9 (McKinney 1963); N.C. GEN. STAT., § 143-291 (1964); N.D. CENT. CODE, § 32-12-02 (1960); ORE. REV. STAT., § 30.320 (1971); S.D. COMPILED LAWS ANN., § 33-6-4 (1967); WASH. REV. CODE ANN., § 4.92.010 (1962).

³⁴ See Borchard, *Government Liability In Tort*, 34 YALE L.J. 1 (1924); Davis, *Sovereign Immunity Must Go*, 22 AD. L. REV. 383 (1970); Davis, *Tort Liability of Governmental Units*, 40 MINN. L. REV. 751 (1956); Green, *Municipal Liability for Torts*, 38 ILL. L. REV. 355 (1944); Harno, *Tort Immunity of Municipal Corporations*, 4 ILL. L.Q. 28 (1921); Kantrowitz and Leflar, *Tort Liability of the States*, 29 N.Y.U. L. REV. 1363 (1954); Kramer, *Government Tort Immunity Doctrine in the United States, 1790-1955*, 1966 ILL. L. FORUM 795 (1966); Mifka, *Sovereign Immunity*, 1966 ILL. L. FORUM 828 (1966); Peck, *The Role of the Courts and Legislature in the Reform of Tort Law*, 48 MINN. L. REV. 265 (1966); Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 LA. L. REV. 476 (1953); Repko, *American Legal Commentary on the Doctrine of Municipal Tort Liability*, 9 LAW & CONTEMP. PROB. 214 (1942); Rosenfeld, *Govern-*

(Continued on next page)

tempting to support it as logical or rational.³⁵ Some examples of judicial criticism of the sovereign immunity doctrine are illuminating. The Supreme Court of Colorado, in *Evans v. Board of County Commissioners*,³⁶ directed its attention to the illogic of the immunity doctrine:

It is possible that sovereign immunity as we know it stemmed in large part from its transformation in the English kingship, including augmented powers and divine and transcendental characteristics, which was occasioned by the Tudor monarchs, particularly Henry VIII, in pursuit of such ends as the split of the Church of England from the Church of Rome and the unity of temporal and spiritual life in England. *The monarchial philosophies invented to solve the marital problems of Henry VIII are not sufficient justification for the denial of the right of recovery against the government in today's society.* Assuming there was sovereign immunity of the Kings of England, our forebears won the Revolutionary War to rid themselves of such sovereign immunity prerogatives. (Emphasis supplied)³⁷

In the same case, the court examined the evolution of the rule and announced that the doctrine in Colorado was the result of two cases. Upon review of those two cases, the court determined that the rule of law promulgated by them, and perpetuated by some forty-odd cases since, was wrong *ab initio*. The court remarked:

We think that [these cases], the two cornerstones of sovereign and governmental immunity in Colorado, were wrong when announced and they are wrong today; *repetition of them forty times or four hundred times doesn't make good law or cause the reasons for the doctrine to become any stronger. In any event, if the doctrines were not wrong when some or all of these decisions were written, they are now.* (Emphasis added)³⁸

(Continued from preceding page)

mental Immunity from Liability for Tort in School Accidents, 5 LEGAL NOTES ON LOCAL GOVERNMENT 380 (1940); Shumate, *Tort Claims Against State Government*, 9 LAW & CONTEMP. PROB. 242 (1942); Van Alstyne, *Governmental Tort Liability: A Public Policy Prospectus*, 10 U.C.L.A. L. REV. 463 (1963); Editorial Note, *Claims Against the State of Ohio: The Need for Reform*, 36 CIN. L. REV. 239 (1967); Note, *Limitations on the Doctrine of Sovereign Immunity from Suit*, 41 COL. L. REV. 1236 (1941); Note, *Approaches to Governmental Immunity for Tort*, 9 LAW & CONTEMP. PROB. 182 (1942); Note, *The Sovereign Immunity of the States: The Doctrine and Some of its Recent Developments*, 40 MINN. L. REV. 234 (1955); Comment, *Ohio Sovereign Immunity: Long Lives the King*, 28 OHIO ST. L.J. 75 (1967); *Governmental Immunity from Tort Liability: Has the Rationale Disappeared?*, 39 UNIV. MO. KAN. CITY L. REV. 252 (1971); *State Immunity from Suit Without Consent: Scope and Implications*, 1971 WIS. L. REV. 879 (1971).

³⁵ Nowhere, for example, in the Ohio Supreme Court decision in *Krause*, does the court squarely support the doctrine on its merits.

³⁶ 482 P.2d 968 (Colo. 1971).

³⁷ *Id.* at 969.

³⁸ *Id.* at 972.

Unlike the California Supreme Court in *Muskopf*, many courts which retain immunity from tort liability place great weight on *stare decisis*. Thus, in *Conway v. Humbert*,³⁹ the South Dakota Supreme Court said:

If governmental immunity . . . was founded upon an erroneous basis . . . it is not now of controlling consideration. *The doctrine has become firmly imbedded in the common laws of this State* and in reliance thereon the legislature has enacted and amended statutes. (Emphasis added)⁴⁰

Likewise, the Supreme Court of Maryland held, in *Weisner v. Board of Education*:⁴¹

In our view the rule of [governmental immunity] is too firmly established and has been too long unchanged by the Legislature in the face of repeated reminders of its role in the matter of opinions of the Courts and the Attorney General to be changed judicially, assuming that it should be changed at all. If there is to be a change, we think the legislature should make it.⁴²

The same type of rationale was espoused by the Supreme Court of Oklahoma: "Clearly our Legislature has in no way intended to change the rule of this law *which has been extant in this State for all these years.*" (Emphasis added)⁴³

Similarly, the Supreme Courts of Maine⁴⁴ and New Mexico,⁴⁵ have utilized the same thought process. However, this line of reasoning hardly serves to support perpetuation of the sovereign immunity doctrine on its authority alone, without some rational, positive force other than mere inertia.

Some courts have demonstrated a willingness to look beyond the weight of ancient precedent in fashioning a more flexible concept of *stare decisis*. For example, on the issue of immunity, the Supreme Court of Illinois said:

We have repeatedly held that the doctrine of *stare decisis* is not an inflexible rule requiring this Court to blindly follow precedents and adhere to prior decisions, and

³⁹ 82 S.D. 317, 145 N.W.2d 524 (1966).

⁴⁰ *Id.* at 324, 145 N.W.2d at 528-29.

⁴¹ 237 Md. 391, 206 A.2d 560 (1965).

⁴² *Id.* at 395, 206 A.2d at 562.

⁴³ *Chicago R. I. & Pacific R.R. v. Board of County Comm'rs*, 389 P.2d 476, 478 (Okla. 1964).

⁴⁴ *Nelson v. Maine Turnpike Auth'y.*, 157 Me. 174, 170 A.2d 687 (1961).

⁴⁵ *Clark v. Ruidoso-Hondo Valley Hosp.*, 72 N.M. 9, 380 P.2d 168 (1963).

that when it appears that public policy and social needs require a departure from prior decisions, it is our duty as a court of last resort to overrule those decisions and establish a rule consonant with our present day concepts of right and justice.⁴⁶

Similarly, the Supreme Court of Arizona manifested an inclination toward change in its leading decision in *Stone v. Arizona Highway Commission*.⁴⁷

*We are of the opinion that when the reason for a certain rule no longer exists, the rule itself should be abandoned. After a thorough re-examination of the rule of governmental immunity from tort liability, we now hold that it must be discarded as a rule of law in Arizona and all prior decisions to the contrary are hereby overruled. (Emphasis added)*⁴⁸

As part of a thorough analysis of the doctrine, the court pointed out that it was "remarkable" that sovereign immunity existed this long:

Professor Borchard has termed this phenomenon as "one of the mysteries of legal evolution." Its survival for such a great period of time in this country, where the royal prerogative is unknown, has perhaps been even more remarkable, considering it has been universally criticized as an anachronism without rational basis. Most writers and cases considering this fact have claimed that its only basis of survival has been on grounds of antiquity and inertia. (Citation omitted)⁴⁹

Finally, after exhaustively repudiating the doctrine, the Supreme Court of Arizona addressed itself to the abrogation issue. Justice Lockwood cast the death blow to governmental immunity in that state:

Upon reconsideration we realize that the doctrine of sovereign immunity was originally judicially created. We are now convinced that a court-made rule, when unjust or outmoded, does not necessarily become with age invulnerable to judicial attack. This doctrine having been engrafted upon Arizona law by judicial enunciation may properly be changed or abrogated by the same process.⁵⁰

⁴⁶ *Molitor v. Kaneland Comm'y Unit Dist.*, 18 Ill.2d 11, 26, 163 N.E.2d 89, 96 (1959).

⁴⁷ 93 Ariz. 384, 381 P.2d 107 (1963).

⁴⁸ *Id.* at 387, 381 P.2d at 109.

⁴⁹ *Id.* at 388, 381 P.2d at 109.

⁵⁰ *Id.* at 393, 381 P.2d at 113.

It has elsewhere been judicially argued that the abrogation of the immunity doctrine is a legislative and not a judicial function. Several supreme courts have forthrightly rejected this contention. The Supreme Court of Washington, for example, has said: "We closed our courtroom doors without legislative help and we can likewise open them."⁵¹

Similarly, the New Jersey Supreme Court addressed itself to the problem and, in answer, enunciated: "It is time for the judiciary to accept a like responsibility and adjudicate the tort liability of the State itself."⁵²

The Federal Question

Perhaps the most novel and vital consideration before the Ohio Supreme Court in *Krause* was the constitutionality of the sovereign immunity doctrine. The Court of Appeals, it will be recalled, held that the immunity rule in Ohio was discriminatory and unjust, and violative of the United States Constitution.

Chief Judge Day, writing the Ohio Court of Appeals opinion, elucidated a meaningful analysis of the important principle of equal protection of the laws, as applied to *Krause*:

If the threat of multiple suits is not a tenable basis for the distinctions created by the immunity, and we hold it is not, then there is none. The distinctions then depend upon a gossamer as frail as that supporting those distinctions founded on nationality or race. A distinction so based is capricious and represents no policy but an arbitrary attempt to lift state responsibility without reason. In such circumstances the permissible line between reasonable classification or a rational policy, and a denial of equal protection is crossed. This fatally offends the Constitution. (Emphasis added)⁵³

In response, Chief Justice O'Neill wrote for the Ohio Supreme Court majority that:

Section 16 of Article I is not, on its face, discriminatory, for it creates no classification. Without enabling legislation it is an absolute bar to suits against the state. Nor is the withholding of a legal remedy from persons injured by the

⁵¹ See *Pierce v. Yakima Valley Mem. Hosp. Ass'n.*, 213 Wash.2d 162, 260 P.2d 765, 774 (1953), involving *charitable* immunity. The principle that a court may abrogate immunities, however, is the same.

⁵² *Willis v. Department of Conserv. & Econ. Dev.*, 55 N.J. 534, 540, 264 A.2d 34, 37 (1970).

⁵³ 28 Ohio App.2d 1, 11, 274 N.E.2d 321, 327 (1971), *rev'd* 31 Ohio St.2d 132, 285 N.E.2d 736 (1972), *appeal dismissed*, 41 U.S.L.W. 3329 (U.S. Dec. 12, 1972) (No. 22), *petition for rehearing dismissed*, _____ U.S. _____, Jan. 22, 1973.

state, while allowing a remedy for nongovernmental tortious activity, discriminatory governmental action. "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner v. Texas* (1940), 310 U.S. 141, 147. "* * * the Fourteenth Amendment does not deny to states the power to treat different classes of persons in different ways." *Reed v. Reed* (1971, _____ U.S. _____, _____, 30 L. Ed. 2d 225, 229 [sic]).

Assuming *arguendo*, that there is in fact a classification, it is one which the General Assembly is empowered to make. To say that the state of Ohio is not entitled to a defense, *i.e.*, the right to plead lack of consent to such suit merely because a nongovernmental tortfeasor does not have the same right, is to preclude the combined legislative judgment that there may be substantive differences between the two types of conduct. "* * * we must be mindful not of abstract equivalents of conduct, but of conduct in the context of actuality. Differences that permit substantive differentiations also permit differentiations of remedy." *Tigner v. Texas, supra* (310 U.S. 141), page 149. Equal protection does not require that all inconsistencies be eradicated.

Moreover, the appellate court's observation that some injured plaintiffs may recover damages if the governmental activity is "excepted activity" is not a valid premise for a finding of a denial of Equal Protection of the Laws. Assuming that such observation refers to municipalities, or other political subdivisions, there are sufficient substantive differences between them and the state to allow for such different results. Whether it is the nature of the conduct or activity undertaken, or the differences in its governmental and corporate existence, we need not now explore. Those substantive differences permit of different remedies and defenses. (See *County of Los Angeles v. Superior Court* [1965]. 44 Cal. Rptr. 796, 402 P. 2d 868.)

For the above-stated reasons, this court holds that the doctrine of governmental immunity is not violative of the Equal Protection Clause of the Fourteenth Amendment. (Footnotes omitted)⁵⁴

⁵⁴ 31 Ohio St.2d 132, 145, 285 N.E.2d 736, 744 (1972), *appeal dismissed*, 41 U.S.L.W. 3329 (U.S. Dec. 12, 1972) (No. 22), *petition for rehearing dismissed*, _____ U.S. _____, Jan. 22, 1973.

Justice Lloyd Brown joined the issue when he wrote in dissent:

Lack of equal protection of the laws can arise from the denial to one segment of society the rights to due process of law required by Fourteenth Amendment which are enjoyed by the rest. Discrimination against such a legally "disenfranchised" group (the victims of state negligence), in derogation of as important a right as due process of law by impeding open and equal access to the courts, is, in the absence of a showing of compelling justification, "invidious discrimination" which violates the equal protection clause.⁵⁵

Given the Ohio Supreme Court's interpretation that this provision is "an absolute bar to suits against the state" in the absence of enabling legislation, then it would seem that the constitutional provision *does* create two distinct classes of persons: namely, those who are injured by private negligence who *may* bring suit for recovery, and those who are injured by governmental negligence who *may not* bring suit for recovery. At the very least, the effect of such an interpretation is the necessary creation of these two distinct classes of persons. As noted, the Chief Justice ultimately did assume, "*arguendo*," that there was such a classification, and justified it essentially on the basis that "Equal protection does not require that all inconsistencies be eradicated."⁵⁶ To say that equal protection does not require the eradication of *all* inconsistencies does not elucidate why equal protection does not require the eradication of *this particular* inconsistency, namely, the inconsistency created by the operation of the judicially-created doctrine of sovereign immunity. It would appear that the Ohio Supreme Court majority never did specifically explain why this *particular* classification is reasonable, or more critically, specifically why or how it can withstand the test of federal constitutionality.

Justice Brown countered the initial proposition of Chief Justice O'Neill as follows:

The majority of this Court has asserted that "Section 16, Article I, is not, on its face, discriminatory, for it creates no classification," because all persons are barred from their bringing suits against the state. However, as recognized in *Brown v. Board of Edn.* (1954), 347 U.S. 483 . . . , "separate but equal" does not comport with equal protection of the laws where a fundamental right is involved.⁵⁷

⁵⁵ *Id.* at 150, 285 N.E.2d at 747.

⁵⁶ *Id.* at 146, 285 N.E.2d at 745.

⁵⁷ *Id.* at 152, 285 N.E.2d at 748.

It appears that Justice Lloyd Brown's opinion comports with the trend of equal protection decisions of the United States Supreme Court, a trend which has continued unabated,⁵⁸ notwithstanding the recent changes in the membership of that Court. (It should be noted that the question of whether sovereign immunity violates the equal protection clause of the fourteenth amendment has never been squarely determined, on the merits, by the United States Supreme Court.)⁵⁹

An early United States Supreme Court decision, *Yick Wo v. Hopkins*,⁶⁰ clearly set forth the basic operative standard of equal protection relied upon by the Ohio Court of Appeals:

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations, between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.⁶¹

Since that time, the concept of equal protection as it inheres in the fourteenth amendment has been elucidated in a long line of analogous decisions.⁶² The essential thrust of the current teachings of these United States Supreme Court decisions would appear to be that where a law, either by its terms, or in its operation, arbitrarily, capriciously, or invidiously discriminates against a class of citizens, the law must fail as violative of the fourteenth amendment. The critical determination depends upon what is an "arbitrary, capricious, or invidious" discrimination. In *Yick Wo v. Hopkins*,^{62a} a law which effectively operated so as to deprive Chinese of the right to engage in business was held to violate equal protection guarantees. In *Baker v. Carr*,⁶³ a system which deprived citizens of an equal

⁵⁸ See *Reed v. Reed*, 404 U.S. 71 (1971); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Griffin v. Illinois*, 351 U.S. 12 (1965); *Douglas v. California*, 372 U.S. 353 (1963); *Baker v. Carr*, 369 U.S. 186 (1962); *Brown v. Board of Ed.*, 347 U.S. 483 (1954); *Takahashi v. Fish & Game Comm'n.*, 334 U.S. 410 (1948); *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

⁵⁹ The Ohio immunity in Article I, § 16 of the Ohio Constitution has withstood a challenge as against Due Process of Law in *Palmer v. Ohio*, 248 U.S. 32 (1918); see *Krause v. Ohio*, 31 Ohio St.2d 132, n. 12 at 146, 285 N.E.2d 736, n. 12 at 745 (1972); *appeal dismissed*, 41 U.S.L.W. 3329 (U.S. Dec. 12, 1972) (No. 22), *petition for rehearing dismissed*, _____ U.S. _____, Jan. 22, 1973.

⁶⁰ 118 U.S. 356 (1886).

⁶¹ *Id.* at 373-74, as cited in *Krause v. Ohio*, 28 Ohio App.2d 1, 10, 274 N.E.2d 321, 327 (1971), *rev'd* 31 Ohio St.2d 132, 285 N.E.2d 736 (1972), *appeal dismissed*, 41 U.S.L.W. 3329 (U.S. Dec. 12, 1972) (No. 22), *petition for rehearing dismissed*, _____ U.S. _____, Jan. 22, 1973.

⁶² See note 60 *supra*.

^{62a} 118 U.S. 356 (1886).

⁶³ 369 U.S. 186 (1962).

power of the vote violated equal protection. In *Takahashi v. Fish and Game Commission*,⁶⁴ a law which forbade aliens to fish in California waters, while allowing non-aliens to do so, violated equal protection of the law. In *Douglas v. California*⁶⁵ and *Griffin v. Illinois*,⁶⁶ laws which gave an unfair advantage to the wealthy criminal defendant, and which the impoverished criminal defendant was denied in the assertion of appellate rights, were held to violate equal protection requirements. In *Shapiro v. Thompson*,⁶⁷ a law which required a one year state residency as a qualification for receiving state welfare benefits violated the equal protection clause of the fourteenth amendment. In *Skinner v. Oklahoma*,⁶⁸ a law which permitted sterilization as a punishment for convicted larcenists, but not for convicted embezzlers, was held to have violated the equal protection clause. As recently as 1971, the United States Supreme Court held in *Reed v. Reed*,⁶⁹ that a legal scheme which deprived women of the same right as men with respect to a state probate system violated equal protection of the law. In *Brown v. Board of Education*,⁷⁰ the United States Supreme Court struck down a legal framework which operated to exclude Negroes from admission to public education, thereby treating these citizens differently from Caucasians.

The decision of the Ohio Court of Appeals was the first in the United States, let alone in Ohio, to examine sovereign immunity in light of the recent constitutional requirements of equal protection of the laws. The same may be said for the dissenting opinion of Justice Lloyd Brown. In this sense, a new vista of legal thought in this state came to encompass sovereign immunity. No prior decision of the Ohio Supreme Court had discussed sovereign immunity from the perspective of the fourteenth amendment's equal protection clause. In the absence of any controlling precedent in this regard, the Court of Appeals was not only free, but was *obligated*, to make its own determination of this important federal question. There were precedents which were helpful, to some extent. Other State Supreme Courts, such as those of California⁷¹ and Arizona⁷², had judicially abrogated sovereign immunity on grounds of public policy.

⁶⁴ 334 U.S. 410 (1948).

⁶⁵ 372 U.S. 353 (1963).

⁶⁶ 351 U.S. 12 (1965).

⁶⁷ 394 U.S. 618 (1969).

⁶⁸ 316 U.S. 535 (1942).

⁶⁹ 404 U.S. 71 (1971).

⁷⁰ 347 U.S. 483 (1954).

⁷¹ *Muskopf v. Corning Hosp. Dist.*, 55 Cal.2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).

⁷² *Stone v. Arizona Highway Comm'n.*, 93 Ariz. 384, 381 P.2d 107 (1963).

Recently, the Colorado⁷³ and New Jersey⁷⁴ Supreme Courts have similarly ruled. In Ohio, decisions such as *Fleischman v. Flowers*⁷⁵ and *Clouston v. Remlinger*⁷⁶ also seemed to signal an increased attention and sensitivity by the Ohio Supreme Court to equal protection considerations. Indeed, in a concurring opinion in *Hack v. Salem*⁷⁷ in which Chief Justice O'Neill then joined, there was a clear indication of dissatisfaction not only with the governmental-proprietary distinction, but also with the sovereign immunity concept itself, as applied to municipalities. In a case which was decided at the same time as *Krause v. State*, namely, *Sears v. Cincinnati*,⁷⁸ the Ohio Supreme Court overruled its prior decision in *Hyde v. Lakewood*,⁷⁹ by holding that the defense of governmental immunity is not available to the municipality which owns and operates a hospital, when the hospital commits negligence. A reading of *Sears* indicates that the Ohio Supreme Court is still operating in the context of the distinction between "governmental" and "proprietary" functions, the former giving rise to sovereign immunity, and the latter allowing suit in the event of tortious conduct. This would seem to be a paradoxical departure from the concurring opinion in *Hack v. Salem* wherein Justice Gibson (with Chief Justice O'Neill joining) wrote as follows:

The Courts have created the theory of liability and the confusing classifications of municipal functions should be willing to abolish the distinctions which so completely ignore the fundamental issue involved as to which party is better able to bear the cost. (Emphasis added)⁸⁰

No such discussion in the majority opinion in *Krause* of "confusing classifications" can be found, nor any such sensitivity to the "fundamental issue . . . as to which party is better able to bear the cost."

It therefore seems that the status of the law in Ohio will remain substantially as it has been, and as the concurring opinion in *Hack* characterized it in 1963: a series of "confusing classifications." It would further seem that the continued perpetuation of the "govern-

⁷³ *Evans v. Board of County Comm'rs.*, 482 P.2d 968 (Col. 1963).

⁷⁴ *Willis v. Department of Conserv. & Econ. Dev.*, 55 N.J. 534, 264 A.2d 34 (1970).

⁷⁵ 25 Ohio St.2d 131, 267 N.E.2d 318 (1971).

⁷⁶ 22 Ohio St.2d 65, 258 N.E.2d 230 (1970).

⁷⁷ 174 Ohio St. 383, 189 N.E.2d 857 (1963).

⁷⁸ 31 Ohio St.2d 157, 285 N.E.2d 732 (1972).

⁷⁹ 2 Ohio St.2d 155, 207 N.E.2d 547 (1965), *overruled in* *Sears v. Cincinnati*, 31 Ohio St.2d 157, 285 N.E.2d 732 (1972).

⁸⁰ 174 Ohio St. 383, 397, 189 N.E.2d at 868.

mental-proprietary” distinction can only involve further difficulties and confusion, which compounds what many magistrates and writers have considered to be the essential injustice: the operation of the doctrine of sovereign immunity, itself.

Hopefully, the ultimate solution to this sensitive question involving the basic right of access to the courts on the part of citizens will ultimately have to be found either in the Federal Constitution, or in legislative action.